In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 645

ROBERT LAMBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 80-84; Pet. 3a-7a) is reported at 226 F. 2d 602.

JURISDICTION

The judgment of the Court of Appeals was entered October 28, 1955 (R. 85; Pet. 8a) and a petition for rehearing (R. 86-87) was denied on November 30, 1955 (R. 89). The time for filing the petition for a writ of certiorari was extended by Mr. Justice Clark to January 28, 1956 (Pet. 9a), and it was filed on January 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission in evidence without objection of a co-defendant's statement after arrest that he sold whiskey in partnership with another individual constituted reversible error as to petitioner.

2. Whether there was sufficient evidence to support the conviction.

STATUTES INVOLVED

The statutes involved provide in pertinent part:

26 U.S.C. 2803 (now 26 U.S.C. 5008(b)(1) and 5642):

(a) No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
[The tax is imposed by section 2800 thereof, now 5001]

* * * * *

(g) Any person who violates any provision of this section * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

26 U.S.C. 3321(a) (now 26 U.S.C. 7206(4)):

> Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both.

STATEMENT

A jury found petitioner guilty under an indictment which charged him and one Arthur Gillyard [1] with unlawful possession (count 1) and concealment (count 2) of distilled spirits in violation of 26 U.S.C. [1952 ed.] 2803(a) and 3321 [2] (R. 1-2). He was sentenced to concurrent terms of imprisonment of two years on each count (R. 9). On appeal, the judgment of conviction was affirmed (R. 85, Pet. 8 a).

The evidence adduced at the trial may be summarized as follows:

About 4:30 a. m. on July 29, 1954, investigator Thompson of the Alcohol Tax Division, Treasury Department, accompanied by Tom Wood, an investigator from the Florida State Beverage Department, saw co-defendant Gillyard, who had ar-

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[1] Gillyard was also found guilty but he did not appeal (R. 70).

[2] Counts 3 and 4 of the indictment also charged internal revenue violations, but the court directed verdicts of acquittal as to them, on the ground that they were repetitious of counts 1 and 2 (R. 2-3, 64).

rived by car and had parked near a house located on N.W. 20th Street, Miami, Florida, make a telephone call from a nearby restaurant (R. 14-15, 31, 32). Gillyard subsequently testified that the call was to petitioner (R. 47). Approximately an hour later, petitioner arrived and went into the house. Within a short time petitioner and Gillyard left the house, each carrying packages which they loaded into the car. (R. 16, 33.) After three such trips, petitioner and Gillyard came out carrying burlap bags which they set on the ground near the back of the car. When petitioner opened the trunk while Gillyard was standing nearby watching, the officers walked up to them, and identified themselves, and placed both under arrest. (R. 16-18, 33-34.) Petitioner escaped (R. 18, 34).

The paper bags and burlap bags which petitioner and Gillyard had carried contained five-gallon and one-gallon jugs full of whiskey which did not bear the required federal tax stamps (R. 18-19, 34-35). In the house, the officers found no furniture except a kerosene lamp, which contained petitioner's fingerprints (R. 19-20, 39-41, 45-46). On the floor in the kitchen they found 13 five-gallon jugs full of whiskey, none of which bore the required federal tax stamps (R. 19, 34-35).

Several weeks later, petitioner surrendered to the police (R. 20, 22).

Petitioner and Gillyard testified to the effect that all of the whiskey belonged to Gillyard, that Gillyard carried the whiskey to the car himself, that Gillyard was interested only in selling whiskey

to petitioner, that all that petitioner did was to help Gillyard open the trunk of the car at Gillyard's request, that they were not partners in the moonshine whiskey business, and that petitioner never entered the house where the whiskey was stored (R. 48-49, 55-58).

ARGUMENT

1. During Treasury Agent Thompson's direct testimony he testified that he talked with Gillyard after his arrest, and that the following had occurred (R. 21-22):

> * * * Gillyard stated to me that he was in the whiskey business on a profit sharing basis with "Little Jim", in response to a question when I asked him whether he was working for "Little Jim", which is the nickname of Lambert. He is commonly known throughout the negro section as "Little Jim". He said he wasn't working for him. He worked with him on a profit sharing basis. They handled the whiskey and shared in any profits there might be.
>
> Mr. ROBERTS [Defense Counsel]: I would like to move to strike that, and ask that the jury be instructed accordingly, in view of the fact that Lambert was not present.
>
> The COURT: The jury is so instructed. A statement made by one of the co-defendants can be only considered as respects to the guilt or innocence of that particular co-defendant, and not as respects to Lambert who was not present at that time.

Subsequently during officer Wood's direct testimony, he testified as follows (R. 35 as corrected R. 91):

> Q. After Gillyard was arrested were any statements made to you by him?
>
> A. Mr. Thompson warned Arthur [Gillyard] of his constitutional rights.
>
> Q. Were you in the presence of him when this was done?
>
> A. I was. Mr. Thompson asked him was he working for Lambert at the time.
>
> Q. Don't say anything that might involve Lambert. Give us the statement that Gillyard said in respect to himself. Nothing in reference to Lambert.
>
> A. Arthur said he was in partners on the deal,—on the moonshine deal.
>
> Q. What sort of partnership was it, did he say—profit-sharing?
>
> A. Yes. When they sold the whiskey they divided the profits.
>
> Q. Between him and this other individual?
>
> A. Yes.
>
> Q. Did he mention any other individual?
>
> A. He did.

Petitioner attributes (Pet. 8-15) prejudicial error to Wood's testimony on the ground that it implicated petitioner, although inadmissible as to him. He argues that when such testimony is combined with the stricken Thompson testimony quoted above, which specifically names petitioner as Gill-

yard's partner, Wood's testimony in effect pointed to petitioner as a partner. But this is obviously a case in which it was proper to try the two defendants together, and, manifestly, it was proper to admit against Gillyard statements which he had voluntarily made. The judge carefully and immediately instructed the jury to disregard Thompson's testimony as to petitioner and to consider it solely as to Gillyard. It is presumed that the jury followed the court's instruction. *Opper* v. *United States,* 348 U.S. 84, 95.

Furthermore, petitioner failed to object to the admission of Wood's testimony and is in no position to complain now. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 238-239; *Holmgren* v. *United States,* 217 U.S. 509, 523; *Allis* v. *United States,* 155 U.S. 117, 122.

2. Petitioner's attack (Pet. 16-18) upon the sufficiency of the evidence to support the verdict is amply refuted by the record (see Statement, *supra,* pp. 3-4). It is true that petitioner and Gillyard denied petitioner's possession of the whiskey. The government's evidence, however, was clear that petitioner was in the house and helped carry out the bags with the whiskey. The jury had the right to disregard defense testimony to the contrary. The conflict in evidence was a matter to be determined by the jury (*Lutfy* v. *United States,* 198 F. 2d 760 (C.A. 9); *Bridgman* v. *United States,* 183 F. 2d 750 (C.A. 9)), and the jury resolved it against the petitioner.

Both courts below having found the evidence sufficient to support the conviction, there is no occasion for further review by this Court. See *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589-590.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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